AYER HITAM TIN DREDGING MALAYSIA BHD.

v.

Y.C. CHIN ENTERPRISES SDN. BHD.

SUPREME COURT, IPOH
TUN DATO' SERI HAJI ABDUL HAMID BIN HAJI OMAR LP,
TAN SRI EDGAR JOSEPH JR. SCJ,
DATO' MOHAMED DZAIDDIN BIN HAJI ABDULLAH SCJ
[CIVIL APPEAL NO 03-12-93]
20 JUNE 1994

CONTRACT: Conditional agreement - Conditional letter by appellant assigning construction works to respondent - Letter contemplated execution of a formal contract to incorporate terms and conditions - Formal contract not executed - Terms and conditions not fulfilled - Whether letter constituted a binding contract - Construction - Principles - Whether Court to apply objective reasonable man test.

The respondent entered into negotiation with the appellant's shareholders to construct and develop low-cost houses and shop houses (the project) for the appellant's workers, and in the process put up some proposals to the latter for the implementation of the project. On 19 September 1984, in purported response to the proposals, the appellant wrote a letter to the respondent in which it was stated, *inter alia*, that the appellant was agreeable to the proposals "subject to the following terms and conditions". The letter then outlined several terms and conditions and clause (vi) thereof said that " the above terms and conditions be constituted in the form of an agreement and that appropriate indemnity clauses in favour of AHTD in respect of material defects in site work...be incorporated in the said agreement".

No agreement was executed by the parties. The respondent was nevertheless optimistic about executing a formal contract and so, to expedite performance under that contract, with the knowledge but not at the request of the appellant, went on to engage architects, engineers etc and commenced preliminary works on the project. Insoluble problems arose between the parties pertaining to the project and on 27 August 1987, while work thereon was still in progress, the appellant wrote to the respondent instructing the respondent to cease all work, whereupon an action for damages for breach of contract was instituted by the respondent. The learned trial Judge ruled that the letter of 19 September 1984 aforesaid, in the circumstances, constituted a binding contract and awarded the respondent the damages applied for. The appellant appealed.

The primary issue that arose was whether on the facts and in the circumstances of this case, the letter of 19 September 1984 embodied any contractual obligations between the parties.

Held:

[1] It is well settled that when an arrangement is made "subject to contract" or "subject to the preparation and approval of a formal contract" and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged. On the other hand, it is also true that, merely because the parties contemplate the preparation of a formal contract, that by itself will not prevent a binding contract from coming into existence before the formal contract is signed.

[2] It is a matter of construction whether the execution of the further contract is a condition or term of the bargain, in which case there is no enforceable contract as the law does not recognise a contract to enter into a contract, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through, in which case there is a binding contract and reference to the more formal document may be ignored. In this respect, the Court, in its task to ascertain the intention of the parties will, generally speaking, apply an objective test. In other words, it will ask itself what would the intention of reasonable men be if they were in the shoes of the parties of the alleged contract.

[3] Having regard to the several essential matters which still remained to be settled between the parties, and taking into consideration the vital qualifying clause " subject to the following terms and conditions" and condition (vi) that followed, which categorically stated that the terms and conditions laid therein would be constituted in the form of an agreement between the parties, the letter of 19 September 1984, on its proper construction, did not

constitute a contract binding in law upon the parties. It was only a record of terms upon which they were agreed as a basis for the negotiation of a contract and which may aptly be called a Letter of Intent and nothing more. The fact that the plaintiff had, after receipt of the letter, conducted itself as if it considered that a contract binding in law had been concluded, is not of any assistance to the construction of this letter.

[4] In the circumstances, the Judge ought to have dismissed the respondent's claim for general damages for breach of contract as there was never a concluded contract entered into by the parties. However, having regard to para (v) of the letter of 19 September 1984, a claim by the plaintiff on a quantum meruit basis for the preliminary works on the site will lie, though liability therefor shall not exceed RM 300,000.

[Appeal allowed. Judgment of the Court below set aside].

[Bahasa Malaysia Translation of Headnote]

KONTRAK: Perjanjian bersyarat - Surat bersyarat oleh perayu menyerahkan hak kerja-kerja pembinaan kepada responden - Surat menyatakan keperluan penyempurnaan suatu kontrak rasmi untuk memaktubkan terma-terma dan syarat-syarat - Kontrak rasmi tidak ditandatangani - Terma-terma dan syarat-syarat tidak dipenuhi - Samada surat merupakan suatu kontrak yang mengikat - Pentafsiran - Prinsip-prinsip - Samada Mahkamah patut menggunakan ujian objektif orang yang waras.

Responden telah berunding dengan pemegang-pemegang saham perayu bagi membina dan membangunkan rumah kos rendah dan rumah kedai (projek tersebut) bagi pekerja-pekerja perayu, dan dalam proses itu telah mengemukakan beberapa cadangan kepada pemegang-pemegang saham bagi perlaksanaan projek tersebut. Pada 19 September 1984, sebagai maklumbalas kepada cadangan-cadangan tersebut, perayu menulis sepucuk surat kepada responden di mana dinyatakan, antara lain, bahawa perayu bersetuju dengan cadangan tersebut "tertakluk kepada terma-terma dan syarat-syarat berikut". Surat itu kemudiannya menggariskan beberapa terma dan syarat serta klausa (vi) di dalamnya itu menyebutkan bahawa "terma-terma dan syarat-syarat yang tersebut di atas dimasukkan sebagai suatu perjanjian dan klausa-klausa indemniti yang patut bagi manfaat AHTD berhubung dengan kecacatan bahan di tapak kerja ... dimaktubkan dalam perjanjian tersebut".

Pihak-pihak tersebut tidak menandatangi sebarang perjanjian. Walau bagaimanapun, responden adalah optimistik untuk menandatangani suatu kontrak yang rasmi dan oleh itu, untuk menyegerakan perlaksanaan di bawah kontrak tersebut, dengan pengetahuan tetapi bukan atas permintaan perayu, responden telah mengupah jurubina, jurutera dan sebagainya dan memulakan kerja-kerja awal berhubung dengan projek tersebut. Masalah-masalah yang tidak dapat diselesaikan timbul di antara mereka berhubung dengan projek tersebut dan pada 27 Ogos 1987, semasa kerja-kerja sedang dikendalikan, perayu menulis kepada responden mengarahkan responden supaya memberhentikan segala kerja, di mana suatu tindakan bagi ganti rugi atas kemungkiran kontrak telah dibuat oleh responden. Hakim yang bijaksana telah memutuskan bahawa surat bertarikh 19 September 1984 yang tersebut di atas, dalam keadaan ini, merupakan suatu kontrak yang mengikat dan beliau telah mengawardkan ganti rugi yang dipohon oleh responden. Perayu membuat rayuan.

Isu utama yang timbul ialah sama ada di atas fakta-fakta dan dalam keadaan kes ini, surat bertarikh 19 September 1984 memaktubkan sebarang obligasi kontraktual di antara pihak-pihak tersebut.

Diputuskan:

[1] Adalah termaktub bahawa apabila sesuatu perjanjian dibuat "tertakluk kepada kontrak" atau "tertakluk kepada penyediaan dan kelulusan suatu kontrak rasmi" dan pernyataan-pernyataan yang serupa, secara umumnya ia akan ditafsirkan sebagai bermakna bahawa pihak-pihak berkenaan masih lagi berada dalam keadaan rundingan dan tidak berhasrat untuk terikat melainkan dan sehingga suatu kontrak rasmi dibuat. Sebaliknya, adalah benar bahawa, hanya kerana pihak-pihak tersebut bercadang untuk menyediakan suatu kontrak rasmi, perkara itu sendiri tidak akan menghalang kewujudan suatu kontrak yang mengikat sebelum kontrak berkenaan ditandatangani.

[2] Adalah merupakan suatu perkara pentafsiran sama ada perlaksanaan kontrak

yang selanjutnya ialah suatu syarat atau terma tawar-menawar, di mana tiada kontrak yang berkuatkuasa memandangkan undang-undang tidak mengiktiraf sesuatu kontrak untuk berkontrek, atau sama ada ia cuma merupakan suatu bayangan akan hasrat pihak-pihak tersebut berhubung dengan transaksi yang telah dipersetujui dan akan diteruskan, di mana terdapat kontrak yang mengikat dan rujukan kepada dokumen yang lebih formal bolehlah diketepikan. Dalam hal ini, Mahkamah dalam tugasnya untuk menentukan hasrat pihak-pihak tersebut akan, secara umumnya, menggunakan suatu ujian objektif. Dalam kata-kata lain, Mahkamah akan bertanya kepada diri sendiri apakah niat orang yang waras sekiranya ia berada dalam kedudukan pihak-pihak dalam kontrak yang dikatakan itu.

[3] Berdasarkan kepada beberapa perkara penting yang masih belum diselesaikan di antara pihak-pihak tersebut, dan mengambilkira klausa kelayakan yang penting iaitu "tertakluk kepada terma-terma dan syarat-syarat berikut" dan syarat (vi) yang berikutnya, yang dengan khususnya menyebutkan bahawa terma-terma dan syarat-syarat yang terkandung di dalamnya itu hendaklah dibuat dalam bentuk suatu perjanjian di antara pihak-pihak tersebut, surat bertarikh 19 September 1984 apabila ditafsirkan dengan sepatutnya, tidak membentuk suatu kontrak yang mengikat pihak-pihak tersebut dari segi undang-undang. Ia hanya merupakan suatu rekod mengenai terma-terma di mana mereka bersetuju sebagai asas untuk merundingkan suatu kontrak yang mana lebih cenderung dipanggil sebagai Surat Niat dan tidak lebih dari itu. Fakta bahawa plaintif telah selepas menerima surat tersebut, mengendalikan dirinya seolah-olah sudah wujud suatu kontrak yang mengikat di sisi undang-undang tidak membantu dalam tafsiran surat ini.

[4] Dalam hal ini, Hakim tersebut haruslah menolak tuntutan responden untuk ganti rugi khas bagi kemungkiran kontrak memandangkan tidak pernah ada sebarang kontrak yang dibuat di antara pihak-pihak tersebut. Walau bagaimanapun, melihat kepada perenggan (v) surat bertarikh 19 September 1984, suatu tuntutan oleh plaintif atas dasar kuantum meruit bagi kerja-kerja awal di tapak tersebut boleh berbangkit walaupun liabilitinya tidak akan melebihi RM300,000.

[Rayuan dibenarkan. Penghakiman Mahakamah di bawah diketepikan].

Cases referred to:

Smith v. Hughes [1871] LR 6 QB 597 ***(refd)***
Vitol B.V. v. Compagnie Europeene des Petroles [1988] 1 Lloyd's Rep. 574 ***(refd)***
Von Hatz Feldt-Wildenburg v. Alexander [1912] 1 Ch 284 ***(refd)***
Branca v. Cobarro [1947] KB 854 ***(refd)***
Rossdale v. Denny [1921] 1 Ch 57 ***(refd)***
Winn v. Bull [1877] 7 Ch D29 ***(refd)***
Richards (Michael) Properties Ltd. v. Corpn of Wardens of St Saviour's Parish Southwark [1975] 2 AER 416 ***(refd)***
Alpenstow Ltd. v. Regalian Properties Plc [1985] 1 WLR 721 ***(refd)***
Filby v. Hounsell [1896] 2 Ch 737 ***(cit)***
Chinnock v. Marchioness of Ely [1865] 4De GJ & S. 638 ***(refd)***
Kam Mah Theatre Sdn. Bhd. v. Tan Lay Soon [1994] 1 MLJ 108 ***(refd)***
Masters & Anor. v. Cameron [1954] 91 CLR 353 ***(refd)***
Cavallari v. Premier Refrigeration Co. Ltd. [1952] 85 CLR 20 ***(refd)***
Love & Steward (Ltd) v. S. Instone & Co. [1917] 33 TLR 475 ***(refd)***
Harichand v. Govind Luxman Gokale [1922] LR 50 Ind App 25 ***(refd)***
Crossley v. Maycock [1874] 43 L J 379 ***(foll)***
Turriff Construction Ltd. and Turriff Ltd. v. Regalia Knitting Mills Ltd. 9 BLR 20 QBD 20 ***(foll)***
British Steel Corporation v. Cleveland Bridge & Engineering Co. Ltd. 24 BLR 94 ***(foll)***

For the appellant - Su Tiang Joo (Teh Meng Teck with him); M/s. Cheah Teh & Su
For the respondent - R.R. Sethu (Khoo Eng Ching with him); M/s. Khoo & Sithu

JUDGMENT

Edgar Joseph Jr. SCJ:

The primary issue which arises for decision in this appeal is whether there was a concluded contract between the appellant as employer and the respondent as contractor, to construct and develop low-cost houses and shophouses for the appellant's workers, in the Mukim of Dengkil, the District of Sepang, State of Selangor.

The appellant, who was the defendant in the Court below, is a public limited company incorporated in Malaysia with its registered office at 16, Jalan Tangsi, Kuala Lumpur.

The respondent, who was the plaintiff in the Court below, is a private limited company incorporated in Malaysia with its principal place of business at 448, Jalan Pudu, Kuala Lumpur, carrying on the business of building and general contractors.

It would be more convenient to refer to the appellant and the respondent as the defendant and the plaintiff respectively. The record provided shows that in March 1981, the plaintiff had entered into negotiations with a third party Malaysia Mining Corporation Berhad ("MMCB"), a majority shareholder of the defendant, to develop and construct low cost houses and shop-houses for the defendant's workers hereinbefore mentioned ("the project"). So far as the defendant was concerned, the project was non-profitable. By September 1984, the defendant's board of directors being agreeable to the plaintiff's proposals, the secretary of the defendant wrote a letter dated 19 September 1984 addressed to the plaintiff ("the letter of 19 September 1984") in the following terms:

Dear Sirs,

Ayer Hitam Tin Dredging Malaysia Berhad (AHTB) Workers Housing Scheme

We refer to the above subject and are pleased to advise that your proposals for the implementation of the housing scheme are agreeable to the Board of Directors of the Company, subject to the following terms and conditions:

(i) that the project shall be on a turnkey basis;
(ii) that the design and selling prices of the individual units shall be as approved by the Jawatankuasa Tetap Kebajikan Pekerja-Pekerja Ladang dan Lombong, Selangor;
(iii) that Y.C. Chin Enterprises shall arrange for end financing of the project;
(iv) payments to Y.C. Chin Enterprises shall be made at stages of completion in accordance with the payment schedule as agreed between the end financier and Y.C. Chin Enterprises and that AHTD (the plaintiff) shall not be liable for any progress payment;
(v) the filling and levelling of the site shall be carried out by Y.C. Chin Enterprises for which AHTD undertakes to pay a sum not exceeding RM300,000 towards the cost of this work;
(vi) that the above terms and conditions be constituted in the form of an agreement between Y.C. Chin Enterprises and AHTD and that appropriate indemnity clauses in favour of AHTD in respect of material defects in site work, foundation and buildings in the project be incorporated in the said agreement.

A copy of the draft agreement will be forwarded to you in due course for your perusal.

We trust that the above are in order and should you agree to the above terms and conditions, kindly sign the duplicate copy of this letter and return to us as soon as possible.

Yours faithfully
Ayer Hitam Tin Dredging Malaysia Berhad

Sgd.
Secretary

In reliance upon the letter of 19 September 1984, the plaintiff had proceeded to make arrangements for end financing for the project and had also commenced preliminary works on the site, for which purpose, architects, engineers and surveyors were appointed. This, they did, although no formal agreement in writing had been executed but in the confident belief that the letter of 19 September 1984 constituted a binding contract.

However, although a copy of the draft agreement referred to in the letter of 19 September 1984 was, in due course, forwarded to the plaintiff for their approval, no such approval was forthcoming, much less any agreement signed, and as late as November to December 1986, the contemporary correspondence passing between the plaintiff and MMCB indicated clearly that negotiations as to the terms of the agreement, including the price, were still in progress.

For the sake of elucidating the issues which arise for decision regarding this part of the case, we must now refer to the contemporary correspondence passing between the parties showing what they say.

First of all, we should like to refer to MMCB's letter dated 25 November 1986 addressed to the plaintiff asking the plaintiff to consider absorbing certain costs to be incurred in connection with the project, which reads as follows:

Dear Sirs,

Ayer Hitam Tin Dredging Malaysia Bhd Payment of Survey Fees.

We have a copy of your letter dated 13 November 1986 addressed to the Mine Manager requesting that arrangements be made to collect relevant fees from the participants.

It is no doubt that the Memorandum of Understanding specifies that payments under items 1 to 7 of your letter are to be borne by the participants. However, we do feel that you would favourably consider absorbing these costs based on the following:

1. Concessions have been made by the Government for this project in particular the payment of plan fees which has been exempted. Other low cost housing projects do not enjoy such concession.
2. The selling price of the houses are pegged at RM25,000 as against RM24,000 at Sungei Besi Mines. No doubt the higher selling price takes into account the remoteness of the project. We have to remind you that if the total cost to the participants exceeds RM25,000 then the EPF may not consider this to be a 'low cost project'. This has been confirmed by the EPF representatives.
3. In addition to the above the Company will be contributing RM300,000 towards the site preparation cost. This represents a bonus to you.
4. The general trend in the construction industry at present is that building costs have somewhat slided lower and that there have been representations by the Mine Housing Committee for a review of the selling price. If this request is made to the participants it will aggravate the situation.

You will no doubt agree that this project is exceptional in nature in that the aforementioned concessions have been granted unlike other low cost projects. As a matter of guide a low cost project at the 16th mile stone of Puchong was sold at between RM17,000 and RM18,000 inclusive of land cost.

In view of the foregoing we suggest that you review the position and hope that you would be prepared to absorb the survey fees etc.

Your consideration in this matter will be highly appreciated.

Yours faithfully,
Malaysia Mining Corporation Berhad

Sgd.
Zulkifli Talib
Group Property Development Manager

Next, the plaintiff replied to MMCB by letter dated 12 December 1986, declining to absorb the costs referred to in MMCB's letter, and making certain counter proposals as follows:

Dear Sirs,

Re: Air Hitam Workers' Housing Scheme Payment of Survey Fees

We refer to your letter dated 25 November 1986 pertaining to the above and wish to clarify our points of view as follows:

1. Firstly we are not involved on the land survey and issue of Land Title. In accordance with the Memorandum of Understanding the Local Land office is to undertake the land title survey, planting of boundary stones and issue of titles. The participants are obliged to pay to Jabatan Tanah at a sum of 2/3 of the prescribed rate as in the case of Sungei Besi Mines Workers' Housing Scheme.

   However to assist the participants to obtain their individual titles at an earlier date and with the mutual understanding with Pejabat Tanah we offer to appoint a licensed surveyor to undertake the title survey work by paying the full rate to the Survey Board and subsidising $^1/_3$ the difference from our own resources.

   The titles will be issued in the names of individuals and we have no control of them.

   We see no reason to absorb the costs of survey fee and boundary stones.

   In addition it might create unnecessary repercussion to other projects(s) thus hampering the progress of this and other schemes.

2. The cost of houses as pegged at RM25,000 has been going through a long process by our submission of price(s) for your consideration, acceptance of same by the participants and approval by the Task Force Committee.

   The latest instance of request by former buyers of PKNS houses to reduce the price has been immediately rejected by the State Government of Selangor should be taken as a typical example that the principles when are accepted/committed should always be adhered to. Otherwise an agreement will no more be an agreement.

   Casually we have checked the price of low cost projects as quoted in your above letter and found that at 14th Milestone of Puchong low cost flats of 2-bedroom type have been built by the State Government for sale. The type of houses of two projects are not comparable.

4. Because of current slowdown of our country economy the general impression is that "the building costs have somewhat slided lower". It is true that the construction industry is dull. Selling price of shophouses, office spaces, medium and high cost houses have been slashed by 15% to 25%. But it is not quite the case in low cost houses. The prices of cement and steel remain unchanged. Some

other materials such as roofing tiles and adjustable louvres have even gone up because of market control and Japanese Yen appreciation. There is no labour shortage however wages of building workers have not come down.

Notwithstanding what has been stated above we wish to offer herewith the following:—

A. The participants have to pay Survey Fees of RM134 each plus RM20 of Boundary stone fees for intermediate lots and RM25 per each corner lots. They will get their titles in return.

B. We offer our assistance to appoint a licensed surveyor to undertake the survey work and ensure that individual titles will be made available for end-finance loan as soon as possible.

C. Upon completion of the project and before the houses are handed over to individual participants we will credit the sum of survey fees paid previously to the participants and the sum will be utilized as deposits and connection fees, if any, for application and installation of meters of electricity and water supply. Should the amount of survey fees fall short of the cost of deposits/connection fee the participants shall cover the deficit, otherwise, the balance will be refunded to the individual.

This offer is a bonus to the participants who have remitted their progressive payment promptly during the course of construction and is not an obligation from the Contractor.

We trust that you will find our offer reasonable and fair. Thank you.

Yours truly,
Y.C. Chin Enterprises Sdn. Bhd.

Sgd.
K.C. Chin
(Managing Director)

Apparently, the counter proposals aforesaid were not acceptable to MMCP for, by a letter dated 5 August 1987, the plaintiff wrote to the defendant complaining that the formal Master Agreement in respect of the project had not been executed by the defendant and warning it of the consequences of delay in the execution thereof in the following terms:

Dear Sir,

Re: Ayer Hitam Tin Mines Workers' Housing Scheme

We refer to our letter dated 5 August 1987.

Todate, we have yet to receive from your office the formal master agreement to be executed between Ayer Hitam Tin Dredging Malaysia Berhad & Y.C. Chin Enterprises Sdn. Bhd. in respect of the above-mentioned project. The circumstances being such, we must draw your attention that the delay of execution of the aforesaid agreement shall render us incapable of continuing to implement the housing development successfully.

We would also like to draw your attention that should there be an increase in prices for building materials and labour wages in future due to further delay to commence construction work, Y.C. Chin Enterprises Sdn Bhd shall reserve the right to claim variation for additional cost in building materials, labour wages and any liability whatsoever arising thereof.

Yours faithfully,
Y.C Chin Enterprises Sdn Bhd

Sgd.
Chia Ping Yue
For Managing Director

That letter evoked a reply dated 11 August 1987 from the defendant to the plaintiff, calling for a discussion as the defendant was in the process of re-evaluating the project, and was as follows:

Dear Tuan Haji,

Workers House Ownership Scheme for Ayer Hitam Tin Mine Workers

Thank you for your letter dated 6 August 1987 on the abovementioned project.

As it was briefed to you in our meeting on 5 August 1987, I would like to reiterate again that our Board is now in the process of re-evaluating the whole scheme. This would include re-arrangement of the end financing as well as the re-negotiation of the terms of the contract work.

We would be pleaded and appreciate it if you could meet us and discuss your proposal as soon as possible.

Thank you.

Yours faithfully
Ayer Hitam Tin Dredging Malaysia Berhad

Sgd.,
Dr. Abdul Razak bin Abdul
Director

The plaintiff declined the request for discussions.

The defendant then by a letter dated 27 August 1987 addressed to the plaintiff, instructed the

plaintiff to cease all work; that letter was in the following:

> Dear Sirs,
>
> **Workers' House Ownership Scheme for Ayer Hitam Tin Mine Workers**
>
> We refer to your letter dated 18 August 1987. We find your uncompromising and intrasigent attitude unfortunate and foresee future problems were we to work together.
>
> We refer yourselves to our letter of 17 December 1986, wherein we have informed you that your proposals for the implementation of the above housing scheme is subject to a formal contract to be drawn up and agreed upon between the parties. In the light of your unwillingness to agree to our mutual terms and benefits we can only assume that it is best that we do not continue our negotiations any longer.
>
> In this event, please note than and administrative and construction work done for the abovescheme is entirely at your own risk.
>
> Yours faithfully
> Ayer Hitam Tin Dredging Malaysia Berhad
>
> Sgd.
> Dr. Abdul Razak bin Abdul
> Director

The case for the defendant, both here and in the Court below, was that appointments and preliminary works had been done before the coming into being of any contract and, that too, upon the instructions of the plaintiff only. That being the case, it was submitted that the plaintiff did so, not upon reliance of the alleged contract, but in anticipation and in order to secure the project from the defendant. The letter was, therefore, part of ongoing negotiations or an agreement to agree on a future agreement which would be prepared by the defendant's solicitors and the terms of which were yet to be agreed upon by the parties - so it was said.

To emphasise the point, it was pointed out that the Draft Master Agreement prepared by Ms. Rashid & Lee, Solicitors for MMCB, sometime in 1986, had not been signed as the parties could not agree on the terms thereof.

On behalf of the plaintiff, it was submitted that all essential terms had been agreed, the parties had intended to assume and had assumed presently enforceable obligations, and that all that remained to be done was to put these terms into the form of a contract. The defendant's contention requires reading the words "subject to contract" into the letter of 19 September 1984, when they are in fact not there - so it was said.

Broadly stated, the result of this appeal depends upon the answer to the question whether, having regard to the circumstances outlined above, the letter of 19 September 1984 embodies any contractual obligations between the parties.

In *Smith v. Hughes* [1871] LR 6 QB 597 it was said that's the existence of an agreement depends upon the intention of the parties, and that for there to be an agreement the parties must be ad idem, i.e. there must be a consensus between them.

But, bearing in mind the familiar saying that person's beliefs or his state of mind are just as much facts as the state of his disgestion or the existence of a tangible object, from what factors may the existence of an agreement be inferred? The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract.

In other words, in its task of ascertaining the intention of the parties, the Court will, generally speaking, apply an objective test; more particularly, it will ask itself, what would the intention of reasonable men be if they were in the shoes of the parties to the alleged contract.

As clear and helpful an enunciation of the principles as any which should guide the Court in determining the ever recurring question of whether there has been a contract between the parties is provided by *Saville J. in Vitol B.V. v. Compagnie Europeene des Petroles* [1988] 1 Lloyd's Rep. 574, at 576 in the following words:

> The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them - and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems

> to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise, it may simply remain impossible to give the words any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain.

In the first place, we should like to make the observation that one would expect that a contract of this nature and magnitude involving as it does a very substantial financial commitment, to wit, RM14 million, would be properly documented.

In the second place, turning to the letter of 19 September 1984, nowhere in it is there anything said as to:

(1) when work on the project would commence or be completed; consequently, the ascertainment of damages for late delivery would become difficult. Similarly, the ascertainment of the defect liability period would also be difficult,
(2) what were the terms of "the appropriate indemnity clauses" in favour of the defendant referred to in clause (vi) of the letter of 19 September 1984 - a matter of no little importance to the defendant bearing in mind that so far as it was concerned, liability was being incurred in respect of a not insubstantial sum of money and the project was non-profitable,
(3) what the price of the individual units of dwelling houses would be, though it did say that this would have to be approved by the Jawatankuasa Tetap Kebajikan Pekerja-Pekerja Ladang dan Lombong Selangor,
(4) the number of dwelling houses and shophouses to be constructed and where the dwelling houses were to be constructed,
(5) the identity of the purchasers of the dwelling houses.

Moreover, it was most material to the point at issue that the letter of 19 September 1984 contained the following qualifying clause in the opening paragraph (the emphasis provided being ours):

> We refer to the above subject and are pleased to advise that your proposals for the implementation of the housing scheme are agreeable to the Board of Directors of the company, **subject to the following terms and conditions.**,

one of which was as follows:

> the above terms and conditions be constituted in the form of **an agreement** between Y C Enterprise Sdn. Bhd. and Ayer Hitam Tin Dredging Malaysia Bhd. and that **appropriate indemnity clauses** in favour of AHTD in respect of material defects in site work, foundation and buildings in the project be incorporated into the said agreement.
> (Emphasis provided).

It will also be recalled that although the letter of 19 September 1984 stated that a copy of the draft agreement would be forwarded by the defendant to the plaintiff no such draft was ever forwarded.

True it is that merely because the parties contemplate the preparation of a formal contract that by itself will not prevent a binding contract from coming into existence before the formal contract is signed. It is not difficult to cite an anthology of cases for this proposition but we need no more than refer to *Von Hatz Feldt-Wildenburg v. Alexander* [1912] 1 Ch 284, (at pp. 288, 289) where the Court said this:

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplates the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case, there is a binding contract and reference to the more formal document may be ignored.

In *Branca v. Cobarro* [1947] KB 854, the agreement entered into by the parties contained a clause as follows:

> This is a provisional agreement until a fully legalised agreement, drawn up by a solicitor and embodying all the conditions herewith stated is signed.

It was held by the Court of Appeal that a binding agreement had come into effect.

But it is now well settled, that when an arrangement is made "subject to contract", (see *Rossdale v. Denny* [1921] 1 Ch 57) or "subject to the preparation and approval of a formal contract" (see *Winn v. Bull* [1877] 7 Ch D29) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged.

We say "generally" because in exceptional circumstances, the "subject to contract" formula will not be so intractable as always and necessarily to prevent the formation of a contract. (See, for example, *Richards (Michael) Properties Ltd. v. Corpn of Wardens of St Saviour's Parish Southwark* [1975] 2 AER 416, *Alpenstow Ltd v. Regalian Properties plc* [1985] 1 WLR 721, *Filby v. Hounsell* [1896] 2 Ch. 737.)

We hasten to add, however, that in both *Richards* and *Alpenstow* the Court made it clear that nothing in the judgment was intended to throw doubt on the effect in law of the time honoured expression "subject to contract". Indeed, in *Chinnock v. Marchioness of Ely* [1865] 4De GJ & S 638 (at 646) Lord Westbury said this:

> if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation.

We must next refer to the recent decision in *Kam Mah Theatre Sdn. Bhd v. Tan Lay Soon* [1994] 1 MLJ 108 cited to us, for the proposition, *inter alia*, that the making of a sale and purchase agreement to also include "other usual terms and conditions" remained largely a matter of conjecture and creates uncertainty. In this context, we have reminded ourselves of the much quoted observations made by Lord Halsbury that:

> every judgment must be read as applicable to the facts proved, ... since the generality of the expressions which may be found there are not intended to be an exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ... a case is only an authority for what it actually decides. (*Quinn v. Leathem* [1901] AC 495, 506).

Thus, the proposition in the *Kam Mah Theatre* case to which we have referred, must be read subject to the consideration that in that case the alleged agreement comprised in a letter in respect of which specific performance had been sought, contained the vital qualifying clause:

> ... provided that the sale and purchase agreement shall incorporate all the terms and conditions herein and other usual terms and conditions and shall be signed on or before 18 March 1989 otherwise the aforesaid sum of RM90,394.20 (equivalent to 5% of the purchase price) shall be refunded to you free of interest without demand forthwith.

In the event, pursuant to the qualifying clause in the letter, the so called deposit fell to be refunded to the purchaser as no sale and purchase agreement was ever signed. In such a situation, the High Court of Australia in *Masters and Anor. v. Cameron* [1954] 91 CLR 353 - an authority uncovered in the final stages of the preparation of this judgment - we would interpolate, said this:

> ... From the fact that a so-called deposit was paid upon the signing of a document which left each party free to decide against entering into a binding contract the *prima facie* inference is that the intention was to provide a sum which should take on the character of a deposit upon the making of a contract, but in the meantime should not become the property of the intending vendor.

For the avoidance of doubt, however, we would add that the proposition in the *Kam Mah Theatre* case should not be construed as detracting from certain well known principles enunciated in three cases to which we shall now refer; namely, *Cavallari v. Premier Refrigeration Co. Ltd.* [1952] 85 CLR 20, *Love and Steward (Ltd.). v. S. Instone & Co.* [1917] 33 TLR 475 and *Harichand v. Govind Luxman Gokale* [1922] LR 50 Ind. App. 25.

In *Cavallari (ibid)*, the High Court of Australia said this at p. 25:

> ... while the due course of completion of a contract for the sale of land is a matter of some complexity, involving the doing of a number of things by both parties, it is very well settled that an informal or 'open' contract not dealing expressly with any of these matters of detail, may be made and be binding. In such a case law and equity fill in the details, so to speak, providing by way of implication for whatever is necessary to effectuate due performance.

Similarly, in *Love and Stewart (ibid)*, Lord Loreburn said this at p. 476)

> It was quite lawful to make a bargain containing certain terms which one was content

with, dealing with what one regarded as essentials, and at the same time to say that one would have a formal document drawn up with the full expectation that one would by consent insert in it a number of further terms. **If that were the intention of the parties, then a bargain had been made, none the less that both parties felt quite sure that the formal document could comprise more than was contained in the preliminary bargain.** But if the intention were that what was agreed in the first instance should be subject to the completion of the formal document, then there was no bargain while that condition remained unfulfilled.

(Emphasis supplied)

Another illustration of what Lord Loreburn had in mind may be found in the Indian Privy Council case of *Harichand (ibid)* when Mr. Ameer Ali, speaking for their Lordships of the Board said this at p. 31:

... Here exhibits A and A1 show clearly that the parties had come to a definite and complete agreement on the subject of the sale. They embodied in the documents that were exchanged the principal terms of the bargain on which they were in absolute agreement, and regarding which they did not contemplate any variation or change. The reservation in respect of a formal document to be prepared by a vakil only means that it should be put into proper shape and in legal phraseology, **with any subsidiary terms that the vakil might consider necessary for insertion in formal document.**

(Emphasis supplied).

Having said that, however, we consider that the case which is especially relevant to the facts and circumstances of the present appeal is *Crossley v. Maycock* [1874] 43 LJ 379 where Sir George Jessel MR said:

If the agreement is made subject to certain conditions then specified or to be specified by the party making it or his solicitor, then until those conditions are accepted, there is no final agreement such as the Court will enforce.

In the present appeal, it is important to note the opening para in the letter of 19 September 1984, containing as it does the vital qualifying clause: "... subject to the following terms and conditions:", and, in particular, condition (vi) which states quite categorically:

that the above terms and conditions in the form of an agreement between Y.C. Chin Enterprises and AHTD and that appropriate indemnity clauses in favour of AHTD in respect of material defects in site work, foundation and buildings in the project be incorporated in the said agreement.

In our view, having regard to the several essential matters which still remained to be settled between the parties to which we have referred and the letter of 19 September 1984 with its vital qualifying clause, "subject to the following terms and conditions", one of which was condition (vi) aforesaid, the present case falls within the principle enunciated by Sir George Jessel MR in *Crossley v. Maycock (ibid).*

It follows that the letter of 19 September 1984 on its true construction did not constitute a contract binding in law upon the plaintiff and the defendant but was only a record of terms upon which they were agreed as a basis for the negotiations of a contract. It may aptly be called a Letter of Intent, the characteristics of which have been accurately described by Judge Fay at first instance in his judgment in *Turriff Construction Ltd and Turriff Ltd v. Regalia Knitting Mills Ltd* 9 BLR 20 QBD 20 (at p. 22 para 3) thus:

As I understand it such a letter is no more than the expression in writing of a party's present intention to enter into a contract at a future date. Save in exceptional circumstances it can have no binding effect.

Later, in his judgment, he re-stated this proposition (at p. 22 para 4) thus:

A Letter of Intent would ordinarily have two characteristics, one, that it will express an intention to enter into a contract in future and, two, it will itself create no liability in regard to that future contract.

We would add that we have not overlooked the fact that the plaintiff had after the receipt of the letter of 19 September 1984 conducted itself as if it considered that a contract binding in law had been concluded, as evidenced by the steps it had taken in that direction to which we have referred. However, this does not really assist in deciding the question of construction of the letter of 19 September 1984 for reasons we now give.

Looking back, our analysis of the factual matrix in the present appeal is that both the plaintiff and the defendant were optimistic about a formal contract being executed pursuant to the letter of 19 September 1984 and, so, to expedite performance under that contract,

the plaintiff, with the knowledge, though not necessarily at the request of the defendant, had commenced the preliminary works hereinbefore mentioned.

The liability of the defendant to the plaintiff in respect of the execution of such preliminary works would, therefore, be on a quantum meruit basis and, provided always, that such liability shall not exceed the sum of RM300,000, having regard to para (v) of the letter of 19 September 1984. The authority which we should like to refer to in support of this conclusion is *British Steel Corporation v. Cleveland Bridge & Engineering Co. Ltd* 24 BLR 94 (at p. 121 last para to p. 122 para 1) where Robert Goff J. (as he then was) said this:

> ... In my judgment, the true analysis of the situation is simply this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter - as anticipated - a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract of which the terms can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi-contract or, as we now say, in restitution. Consistently with that solution, the party making the request may find himself liable to pay for work which he would not have had to pay for as such if the anticipated contract had come into existence, e.g. preparatory work which will, if the contract is made, be allowed for in the price of the finished work (of *William Lacey (Hounslow) Ltd. v. Davis* [1957] 1 WLR 932). This solution moreover accords with authority, e.g. the decision in *Lacey v. Davis* (above); the decision of the Court of Appeal in the unreported case of *Sanders & Forster Ltd v. A Monk & Co. Ltd.* (6 February 1980), though that decision rested in part on a concession; and the *crisp dictum* of Parker J. in *OTM Ltd v. Hydranautics* [1981] 2 Lloyd's Rep 211 at p. 214, when he said of a letter of intent that 'its only effect would be to enable the defendants to recover on a quantum meruit for work done pursuant to the direction' contained in the letter.

The Judge should, therefore, have dismissed the plaintiff's claim for general and special damages for breach of contract and interest on such damages as there never was a concluded contract entered into by the parties.

However, as we have indicated, a claim by the plaintiff on a quantum meruit basis for the preliminary works on the site hereinbefore mentioned, which was made by way of alternative in the statement of claim, will lie, though liability in respect thereof must not exceed RM300,000, for the reason stated. We would, therefore, remit this last mentioned aspect of the case to the Judge for assessment and for an order for payment of the sum found due on such assessment.

The result, therefore, is that this appeal succeeds, and must therefore be allowed. The judgment of the Court below is set aside. Costs here and below to the defendant. The deposit must be refunded to the defendant.